No. 96-847

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

AT & T FAMILY FEDERAL CREDIT UNION and
CREDIT UNION NATIONAL ASSOCIATION, INC.,
Petitioners,

v.

FIRST NATIONAL BANK AND TRUST CO., *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF

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INTRODUCTION

In our petition, we showed that certiorari is warranted to review the court of appeals' application of its own "suitable challenger" doctrine to confer standing on parties whose interests are squarely opposed to those that Congress intended to protect through the Federal Credit Union Act ("FCUA"), as well as to review the court's determination that the agency's interpretation of the statute entrusted to its administration was entitled to no deference in light of the purported clarity of the statutory language. Tellingly, the Banks have declined to defend the court of appeals' reasoning on its own terms in either respect. Instead, they contend that the court -- contrary to its own statements -- did not actually apply an alternative route to standing, and they attempt to defend the court's merits determination on grounds that the court itself expressly rejected. The Banks do not dispute the critical importance of this case to the entire credit union movement, and their studious avoidance of the court of appeals' reasoning only underscores the need for this court's review.

ARGUMENT

1. In its standing decision, the court of appeals stated that "[l]itigants can qualify as 'protected' by a statute if they are intended beneficiaries of the legislation or are nevertheless what we have termed suitable challengers * * *." Pet. App. 30a, NCUA Pet. App. 21a. The court then rejected the Banks' "claim that they qualify as intended beneficiaries as suitable challengers under the FCUA," and went on to address "the more subtle question, whether banks can be thought suitable challengers to enforce a requirement designed to benefit the members * * * of credit unions." Pet. App.

30a-32a, NCUA Pet. App. 21a-22a. The court held that the Banks had standing as suitable challengers because they "can be thought to have interests 'systematically aligned' with those the statute is designed to benefit." Pet. App. 36a, NCUA Pet. App. 28a. In its subsequent decision on the merits, the court of appeals recognized that its prior decision had upheld standing "on the ground that the banks are 'what we have termed suitable challengers * * *.'" Pet. App. 5a (quoting Pet. App. 30a), NCUA Pet. App. 5a (quoting NCUA Pet. App. 21a).

We restate the court of appeals' decision to show that the Banks evidently have no desire to defend it on its own terms. The Banks try to paint the standing decision as a "routine" and "straightforward" ruling, Opp. 10, 11, but the court itself acknowledged that the issue was "devilishly complex." Pet. App. 37a, NCUA Pet. App. 29a. Most remarkably, the Banks try to suggest that the standing decision was not based on the D.C. Circuit's "suitable challenger" doctrine, Opp. 13, when -- as set forth above -- both the standing and merits decisions expressly recognized that standing was granted to the Banks as "suitable challengers." Pet. App. 5a, 31a; NCUA Pet. App. 5a, 22a.[1/]

[1/] The Banks' disingenuous suggestion that the "suitable challenger" doctrine arose only because it was argued by petitioners, Opp. 13, is rather readily rebutted by the court of appeals itself, *see* Pet. App. 30a, NCUA Pet. App. 21a (Banks "claim that they qualify * * * as suitable challengers under the FCUA"); *see also* Brief for Appellants at 32-37, *First National*

(footnote continued to next page)

The court of appeals certainly did try to find support for its suitable challenger test in this Court's standing precedents, but, as we explained in the petition, the D.C. Circuit's test goes far beyond those cases. Pet. 12-16. The extent of the departure is clearly demonstrated by this case. In *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987), and *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971), standing was conferred on competitors because the purpose of the provisions in question was to limit competition, *see* 479 U.S. at 403, 401 U.S. at 20; *see also* Pet. 15. In stark contrast, however, the decision below confers standing on credit union competitors in the absence of any such showing and in the face of a recognition that the purpose of the common bond provision was to strengthen and promote credit unions -- hardly an objective shared by their competitors. Thus the D.C. Circuit's "suitable challenger" test turns the purpose of this Court's zone of interest test -- "to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives," *Clarke*, 479 U.S. at 379 n.12 -- on its head.

2. Like the court below, the Banks try to minimize the conflict with the Fourth Circuit's decision in *Branch Bank and Trust Co. v. NCUA*, 786 F.2d 621 (4th Cir. 1986), *cert. denied*, 479 U.S. 1063 (1987), by noting that the decision antedated this Court's decision in

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Bank and Trust Co. v. NCUA, Nos. 91-5262 & 91-5336 (D.C. Cir., filed August 18, 1992).

Clarke and arguing that the Fourth Circuit's decision did not survive *Clarke*. The Banks are wrong. *Clarke* recognized that the zone of interest test "[a]t bottom * * * turns on congressional intent." 479 U.S. at 400. The Fourth Circuit in *Branch Bank*, examining Congress' intent in enacting the common bond requirement, correctly held that "the interests of banks are far removed from the interests of the credit union members protected by these provisions." 786 F.2d at 625. In sharp contrast, the D.C. Circuit below held that the Banks "can be thought to have interests 'systematically aligned' with those the statute is designed to benefit." Pet. App. 36a, NCUA Pet. App. 28a. Nothing in *Clarke* mitigates this stark and irreconcilable conflict.

The subsequent history of *Branch Bank* confirms that it is fully consistent with *Clarke*. The losing bank in *Branch Bank* filed a petition for certiorari with this Court, which held the petition pending its decision in *Clarke*. On January 27, 1986 -- 13 days after announcing its decision in *Clarke* -- this Court disposed of the petitions being held for that opinion, including the one in *Branch Bank*. The Court's practice is to "GVR" -- grant certiorari, vacate the judgment, and remand for reconsideration -- a petition being held pending a Supreme Court decision if it is even arguable that the lower court decision is inconsistent with or affected by the Supreme Court decision. *See, e.g.*, A. Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*, 11 Hastings Const. L.Q. 5, 23 (1983) ("the Court ordinarily issues reconsideration orders whenever the lower court's ruling is even arguably vitiated by the intervening decision and denies review only when the judgment is perceived as clearly in

accord with the plenary opinion"). The Court did not "GVR" the *Branch Bank* decision, but instead simply denied certiorari -- suggesting that it saw no inconsistency with its own decision in *Clarke*.[2/]

[2/] The Banks also argue that the court of appeals' decision on standing is in accord with other circuit court decisions, Opp. 12 n. 11, but the cases they cite do not support their point. *Adams v. Watson*, 10 F.3d 915 (1st Cir. 1993), did not involve a challenge under the Administrative Procedure Act, and the court merely held in passing that milk producers who ship in interstate commerce were within the zone of interests protected by the Commerce Clause. *Id.* at 919 n.7. Likewise, neither *DeLoss v. Department of Housing and Urban Development*, 822 F.2d 1460 (8th Cir. 1987), nor *Foremost Sales Promotions, Inc. v. Director, Bureau of Alcohol, Tobacco and Firearms*, 860 F.2d 229 (7th Cir. 1988), applied any analysis even remotely akin to the D.C. Circuit's suitable challenger doctrine. To the contrary, the courts in those cases found that specific statutory language evidenced Congress' intent to protect the plaintiffs' interests. *DeLoss*, 822 F.2d at 1464-65; *Foremost*, 860 F.2d at 233-34. The Banks note the Sixth Circuit decision conferring standing on banks to challenge NCUA's interpretation of the common bond provision on the ground that otherwise a challenge might not be brought, *Community First Bank v. NCUA*, 41 F.3d 1050 (6th Cir. 1994), *see* Opp. 12, but do not attempt to defend its reasoning. See Pet. 20-21.

The other circuit court case cited by the Banks, *Scheduled Airlines Traffic Offices, Inc. v. Department of Defense*, 87 F.2d 1356 (D.C. Cir. 1996), only serves to demonstrate the aberrant nature of the D.C. Circuit's suitable challenger doctrine and its far-reaching effects. *See* Pet. 30 n.11. In that case, the court -- relying on its decision in the present case -- held that the plaintiffs were suitable challengers of an internal agency procurement policy even though the court expressly recognized that the plaintiffs' interests were not among those that Congress intended to benefit through the procurement statute at issue. 87 F.3d at 1359-60.

3. Just as with their discussion of the court of appeals' decision on standing, the Banks do not even attempt to justify the primary reasoning employed by the court in its decision on the merits. Instead, they seek to defend that decision on grounds the court itself rejected. The court was right to reject the grounds the Banks now attempt to resurrect, and the Banks' own failure to defend the actual basis for the court's decision underscores the need for this Court to review the indisputably important issues presented by this case.

In its ruling on the merits, the court of appeals invalidated NCUA's interpretation of the common bond provision based largely on its conclusion that the common bond concept is already implicit in what it believed to be the plain meaning of the word "group." As explained in our petition, the court erred because "group" does not necessarily imply significant commonality. In fact, the same dictionary the court cited for its version of the plain meaning of that word contains an alternative definition that does not imply commonality. *See* Pet. 23-24.

The Banks, in the proceedings below, did not advocate the analysis of the statutory language on which the court of appeals primarily relied, and they do not try to defend it in their opposition. Rather they argue that the singular article "a" in the phrase "having a common bond of occupation" requires that there be only one common bond per credit union. Opp. 15. The court of appeals quite properly rejected this argument, however, stating that: "The article 'a' could as easily mean one bond for each group as one bond for all groups * * *." Pet. App. 6a, NCUA Pet. App. 6a.

The Banks seek to support their argument that the singular article "a" is meaningful by quoting the part of the Senate Report on the Act which states that "a credit union is a cooperative society, * * * limited in each case to the members of a specific group with a common bond of occupation or association." Opp. 4. The Banks fail to mention, however, that it was the House bill that became law. *See* 78 Cong. Rec. 12079 (1934) (Senate accepted House "amendment" that resulted in striking out all after the enacting clause and inserting the House substitute language). The House Report described the common bond provision as follows: "Membership in Federal credit unions is limited to groups having common bonds of occupation or association * * *." H.R. Rep. No. 2021, 73d Cong., 2d Sess. 3 (1934) (emphasis added). This directly supports NCUA's interpretation of the provision. At a minimum, it demonstrates that the provision at issue plausibly can be read two ways.[3/]

4. The Banks claim that NCUA's multiple group policy deprives the common bond requirement of all substance. This is incorrect. Under NCUA's policy, each occupational group within a multiple group credit union must have a common bond. These bonds, singly and together, serve as the "cement" uniting credit union

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3/ The Banks also contend that the court of appeals was correct in ruling that NCUA's interpretation could not be made to fit the structure of the provision. We addressed this point in our petition (at 25 n.9) and will not repeat our position here.

members in a common venture and producing a sense of shared responsibility that discourages default. Thus, NCUA's policy permitting multiple common bonds preserves the value that Congress intended the common bond provision to foster and, at the same time, advances Congress' primary objective for the Act as a whole: to make credit union services available to more people. *See* Pet. 27.

5. The Banks do not challenge in any way our showing with respect to the importance of the issues raised for the federal credit union system. They suggest instead that the federal credit union system is not that important. Thus, they blithely suggest that many federal credit unions impacted by the decision below could convert themselves to state-chartered institutions without serious consequences. Opp. 18. This ignores Congress' express rationale in creating the federal credit union system. Congress passed the Federal Credit Union Act to provide a federal alternative to the state system that already existed in 1934 with the objective of increasing credit union membership. It was aware that "the State laws differ in essential particulars and many of them are imperfect, rendering normal development impossible." S. Rep. No. 555, 72d Cong., 2d Sess. 2 (1934). Congress also sought to establish a means for credit unions "to escape overburdensome state taxation." *Id.* These considerations remain valid today and make conversion a poor alternative for many credit unions. While state credit union laws have become more similar over the years, significant differences still remain. These differences would have a particularly adverse impact on credit unions doing business in more than one state. In addition, many states impose taxes on state-chartered institutions from which federal credit unions remain exempt.

Finally, the Banks seek to deflect our showing that the court of appeals' interpretation of the common bond provision will deprive many consumers of access to credit union services by arguing that these services are "universally available." Opp. 18. This assertion is unsupported and untrue. A substantial percentage of consumers do not hold jobs or live in communities that provide them with the opportunity to join a credit union.

CONCLUSION

For the foregoing reasons, and those in the petition, this Court should grant the petition for certiorari.

Respectfully submitted,

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